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Rescinding Ratification of Proposed Constitutional Amendments - A Question for the Court

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RESCINDING RATIFICATION OF PROPOSED CONSTITUTIONAL AMENDMENTS—A QUESTION FOR THE COURT

Since it was proposed by Congress in 1972, thirty-five state legislatures have indicated their assent to the proposed Equal Rights Amendment.[1] Three of these—Tennessee, Nebraska and Idaho—have passed resolutions rescinding their ratifications.[2] Should three more states ratify, it will become impossible to determine the content of the Constitution without first deciding whether the rescissions were constitutionally permissible.

Rescission: The Original Understanding

Although the Constitution does not explicitly provide for rescission of resolutions ratifying amendments,[3] it is reasonable to suggest that the controversy is artificial, in light of the general rule that a legislative body may rescind any of its own actions, at least until they have taken effect.[4] Obviously, once three-quarters of the state legislatures have unequivocally ratified an amendment and it has become effective as part of the Constitution, it can only be repealed by the normal amending process prescribed in Article V.[5] In the absence, however, of some textual or logical limitation on a legislature's right to withdraw its assent to a *proposed* amendment, such power is implicit in the legislature's right to prescribe its own rules.

The tenth amendment to the Constitution would seem to buttress the presumption in favor of such state legislative power. However, the power

1. 35 CONG. Q. WEEKLY REP. 179 (Jan. 29, 1977).

2. *Id.; Equal Rights Amendment Gains in Two States*, N.Y. Times, Feb. 10, 1977, at 18.

3. "The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate." U.S. CONST. art. V.

4. L. CUSHING, ELEMENTS OF THE LAW AND PRACTICE OF LEGISLATIVE ASSEMBLIES IN THE UNITED STATES OF AMERICA § 1260 (Irish University Press reprint 1971) (1st ed. Boston 1856); *cf.* L. ORFIELD, AMENDING THE FEDERAL CONSTITUTION 67 (1942) [hereinafter cited as ORFIELD].

5. *See* ORFIELD, *supra* note 4, at 72.

to ratify amendments to the Federal Constitution has been held to be a "federal function" exercised by the state legislatures by virtue of a special grant of power in Article V, and not a reserved power of the states under the tenth amendment.[6] Notwithstanding this construction, state legislatures may apply their own rules to the ratification procedure,[7] even provisions requiring "super-majorities" for passage of ratification resolutions.[8] A rule providing for rescission of resolutions would seem to be no exception.

The most exhaustive attempt at a principled defense of the proposition that a legislature may *not* rescind its ratification was made by John Alexander Jameson in his treatise on constitutional conventions.[9] Judge Jameson found, in the constitutional provision that an amendment is valid "when ratified" by three-fourths of the state legislatures,[10] a grant of special power to each legislature which "when exercised . . . by ratifying . . . ceases to be a power . . . ."[11] Passage by a legislature of a ratifying resolution is, in this view, a sort of sacramental act, which may take only a moment to consummate but which is forever binding on the legislature (and on the whole nation).[12] Jameson also advanced a reliance theory according to which one state's ratification "induces" similar action by other states.[13] Why this is true, or why it should make any difference so long as any state so "induced" may restore itself to its original position by rescinding its own ratification, was not explained.

In finding that a ratification becomes "effective" and therefore irrevocable the moment it is passed by the legislature, Judge Jameson blurred the distinction between one state's passage of a resolution, and the completion of the whole process by which the amendment becomes a part of the Constitution. Indeed, he professed to see no difference between rescission before three-quarters of the states had ratified, and afterward;[14]

6. Leser v. Garnett, 258 U.S. 130, 136-37 (1922); Hawke v. Smith, 253 U.S. 221 (1920).

7. Since the state legislature is performing a "federal function" in ratifying, it may make its own rules even where inconsistent with the state constitution. Dyer v. Blair, 390 F. Supp. 1291 (N.D. Ill. 1975) (Stevens, Cir. J.); *cf.* Leser v. Garnett, 258 U.S. 130, 137 (1922). *See generally* ORFIELD, *supra* note 4, at 61-78.

8. Dyer v. Blair, 390 F. Supp. 1291, *esp.* 1305 n.34 (N.D. Ill. 1975) (Stevens, Cir. J.).

9. J. JAMESON, CONSTITUTIONAL CONVENTIONS 629-33 (4th ed. 1887) [hereinafter cited as JAMESON].

10. U.S. CONST. art. V.

11. JAMESON, *supra* note 9, at 628.

12. *Id.* at 632.

13. *Id.* at 632-33.

14. *Id.* at 633.

and his horror of a theory which might justify secession (by a state's "rescission" of the Constitution itself)[15] virtually compelled his conclusions.[16]

Judge Jameson's arguments—and, as will be shown, all the important precedents and authorities relied on by those who would deny a state the right to rescind—are rooted in the philosophical and political currents of the Reconstruction Era.[17] Whatever the felt necessities of those times, it is suggested that the framers of the Constitution probably intended, and that the integrity of our constitutional structure certainly demands, that a state be able to reconsider its ratification of a proposal which has not yet become part of the Constitution.

In *The Federalist* No. 85, Hamilton argued that the amending procedure was designed to ensure that "the will of the requisite number" should prevail.[18] The Constitution would be amended "whenever [three-fourths of the] States, were united in the desire of a particular amendment."[19] This emphasis on *consensus* as the essential ingredient in the amending process contrasts sharply with Jameson's assertion, a century later, that the framers had intended each separate legislature's ratification to be irrevocable, regardless of whether a consensus among the states ever existed. If, for example, 38 state legislatures have ratified an amendment over a seven-year period, but 20 of the 38 have rescinded their ratifications, it cannot be said that 38 states were ever "united in the desire" for the amendment.

Those members of the Constitutional Convention who expressed their feelings on the matter saw the amending process as a means of procuring changes about which there was a broad consensus.[20] They rejected the standard of unanimity as too difficult to achieve,[21] but felt that a substantial minority of the states should be able to block changes favored by a

15. *Id.*

16. Jameson has been widely relied upon, apparently because he was first to publish a comprehensive theory on ratifications and rescissions. But when a contemporary accused him of bias, he proudly replied that his work had been written, "every line of it, literally, to the beating of the Union drums," expressly to refute theories "which had made possible and easy the wicked revolt of the South." *Id.* at 657 (app. C).

17. See note 16, *supra*; text at notes 71-80, 86-89, 104, *infra*.

18. THE FEDERALIST No. 85 (A. Hamilton).

19. *Id.*

20. *See id.* No. 39 (J. Madison); No. 43 (J. Madison); No. 85 (A. Hamilton); 1 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 476, 478 (rev. ed. 1937) [hereinafter cited as FARRAND].

21. *See* 1 FARRAND, *supra* note 20, at 476, 478; 3 *id.* at 120-21.

majority,[22] and were generally fearful of frequent amendments.[23] Thus it would seem that any ambiguity in the language of Article V ought to be resolved in favor of the interpretation which would make it *more difficult* to amend, and which would prevent change absent a sufficiently broad consensus.

The United States Supreme Court has recognized consensus, and not the formality of a certain number of isolated legislative acts, as the *sine qua non* for ratification:

> [A]s ratification is but the expression of the approbation of the people and is to be effective when had in three-fourths of the states, there is a fair implication that it must be sufficiently contemporaneous in that number of states to reflect the will of the people in all sections at relatively the same period . . . .[24]

The Court's doctrine that an amendment proposed by Congress must be ratified within a "reasonable time" is based on the *possibility* that after such a period has elapsed, even if some states should ratify an "old" proposal, other states which had ratified earlier might no longer be participating in a current consensus.[25] A fortiori, if one or more states have given a positive indication that they no longer support the amendment, they cannot be said to be part of a consensus.[26]

While disagreement exists on the merits of individual proposed amendments, experience has strengthened the view that resort to the amending process should be made only in extraordinary situations.[27] Thus the canon of construction proposed above—that ambiguities be resolved in favor of the construction which would make amendment more difficult—has been suggested in other contexts, not as a means of being faithful to the precise wishes of the framers, but as a prudential means of protecting the Constitution from hasty alterations which might not reflect an enduring consensus.[28] One reflection of this attitude was the passage by the United

22. *See* 2 *id.* at 148, 555, 557-59, 629-31.

23. *See* 2 *id.* at 629-31; 3 *id.* at 127.

24. Dillon v. Gloss, 256 U.S. 368, 375 (1921).

25. *See* ORFIELD, *supra* note 4, at 75-76.

26. *See* S. REP. NO. 336, 92d Cong., 1st Sess. 14 (1971).

27. *See id.* at 6; *id.* at 18-19 (separate views of Messrs. Bayh, Burdick, Hart, Kennedy and Tunney). *Cf.* materials cited in note 28, *infra*.

28. *See, e.g.*, Black, *Amending the Constitution: A Letter to a Congressman*, 82 YALE L.J. 189 (1972); *Federal Constitutional Convention: Hearings on S. 2307 before the Subcomm. on Separation of Powers of the Comm. on the Judiciary, United States Senate*, 90th Cong., 1st Sess. 60, *esp.* 60-61, 67 (1967) (statement of Alexander Bickel) [hereinafter cited as *1967 Hearings*]; *id.* at 237-38 (memorandum by Robert G. McCloskey). Professor McCloskey suggests "the amending process

States Senate, in 1973, of a measure expressing support for the view that a state ought to be able to rescind its ratification.[29]

The view that Article V should be read to permit rescission is further strengthened by the general construction of that Article as allowing a state to ratify an amendment after a prior negative action.[30] It is difficult to conceive of the Constitutional Convention promulgating a plan by which pro-amending forces have the unlimited opportunity to bounce back from a defeat, while denying the same right to those who prefer to keep the Constitution as it is.[31]

In view of the foregoing, it is not surprising that the validity of the recent rescissions has not been challenged on the merits. Apparently, no one now claims that the Constitution compels state ratifications to be irrevocable. Rather, the issue has been labelled a "political question," to be resolved by Congress, whose decision on the matter will not be questioned by the courts. Yet no court has ever confronted the issue, and the authorities cited for the proposition are at best questionable.[32]

Political Questions: Principle or Pretext?

Controversy as to the proper scope of the "political questions" doctrine is inextricable from the debate over the foundations of judicial

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should be made as difficult as the language and intent of the Constitution will permit. We have the oldest stable constitutional system in the world; and I think its stability is related to its . . . relative immutability." *Id.* at 238.

29. 119 CONG. REC. 22731-37 (1973). The bill sought, *inter alia*, to enact into law the states' right to rescind ratifications of proposed amendments. S. 1272, 93d Cong., 1st Sess. § 13(a) (1973). It died in the House Judiciary Committee. *See* 119 CONG. REC. 23138 (1973). Even had the bill been enacted, it could not have had the force of law, since: (1) if the Constitution compels either result on the rescission question, the bill could neither modify nor add anything to the constitutional rule; (2) if Congress can make the rules about rescission, then a mere statute would not be binding on future Congresses, whose own legislative acts would automatically repeal any prior inconsistent legislation. *Cf.* Black, *supra* note 28, at 192. Passage by the Senate of the measure favoring the state right to rescind is important, however, as the last expression by either House, outside the context of the E.R.A. controversy, on the fairness and desirability of the rule.

30. *See* JAMESON, *supra* note 9, at 624-29; ORFIELD, *supra* note 4, at 70-71. *Coleman v. Miller*, 307 U.S. 433 (1939), held the effect of a prior rejection to be a political question to be resolved by Congress—but even if this holding is still valid, Congress in theory is obliged to honor any rule implicit in the Constitution. See discussion of *Coleman* in the text at notes 94-121, *esp.* 118-19, *infra*.

31. *See* ORFIELD, *supra* note 4, at 72 & n.108.

32. Even outside the context of the current controversy, most commentators have presumed the question of rescission to be non-justiciable; the presumption is based not on text, history or logic, but on the dubious precedents discussed in the text at notes 71-85 & 94-170, *infra*. *See, e.g.*, ORFIELD, *supra* note 4, at 26 & n.68.

review.[33] The classical justification for judicial review—the "private rights model" grounded in *Marbury v. Madison*[34]—is that the Supreme Court is the highest *court* in the land. As such, the Court has a duty to vindicate the rights of private parties. When the outcome of a case within the Court's jurisdiction must turn on a construction of the Constitution, the Court is bound to decide what the Constitution says about the case. Whenever the Court has the power to interpret the Constitution, it also has a duty to exercise that power.[35] Therefore, when the Court labels a question "political" it has already interpreted the Constitution and determined *either* (1) that the Constitution has given the political branch unlimited freedom of action in a certain area, so that nothing it could do in this area would be unconstitutional; *or* (2) that while a certain action of the political branch might be unconstitutional, the Constitution has given that branch the authority to *adjudicate* the question, so that the Court has no power to decide whether the action was constitutional.[36] In the first category are, inter alia, the President's power to recognize any foreign government he wishes[37] and the power of the political branch to decide when a certain expenditure is for the "general welfare."[38] In the second category—the only "true political questions" wherein the Court refrains from evaluating the constitutionality of a decision made by another branch—are Congress's right to judge the qualifications of its own members,[39] and the impeachment process.[40] In the classical view, once a case is properly before the Court, its duty to decide all issues can only be

33. *See* Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517 (1966); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

34. 5 U.S. (1 Cranch) 137 (1803).

35. This Comment will not discuss the principles underlying certiorari jurisdiction. The discussion here should be understood to apply once a case is before the Court, whether on appeal or certiorari. *See* Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 24-25 (1964).

36. *See* Wechsler, *supra* note 33, at 9.

37. "[H]e shall . . . receive Ambassadors and other public Ministers . . . ." U.S. CONST. art. II, § 3. *See* LIBRARY OF CONGRESS, CONGRESSIONAL RESEARCH SERVICE, THE CONSTITUTION OF THE UNITED STATES OF AMERICA REVISED AND ANNOTATED 541-44 (1973 ed.) [hereinafter cited as CONSTITUTION ANNOTATED].

38. U.S. CONST. art. I, § 8, cl. 1. *See* CONSTITUTION ANNOTATED, *supra* note 37, at 136-41.

39. "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members . . . ." U.S. CONST. art. 1, § 5. *See* Wechsler, *supra* note 33, at 8.

40. *See* U.S. CONST. art. I § 3, cl. 6; Wechsler, *supra* note 33, at 8.

superseded by a clear, "textually demonstrable" grant of adjudicative power to some other institution.[41]

Marbury did not assert that the Court's duty to construe the Constitution was unique within the structure of government; in the private-rights model, the views of the Supreme Court will prevail over those of the other branches primarily because of the Court's power to issue writs which other officials are bound to obey.[42] Modern theorists, on the other hand, emphasize not the Court's duty to litigants who happen to be before it, but the Court's special role as the pre-eminent interpreter of the Constitution.[43] As these same theorists have come to reject the idea of a "mechanical" application of the text of the Constitution to modern problems, the Court has been pictured as an institution with the unique mission of making principled value judgments about legislative and executive decisions.[44] This "special function model" has obvious consequences for the political questions doctrine: if the Court is to be concerned primarily with the long-range effects that its decisions have on society, rather than with strict fidelity to the text of the Constitution in adjudicating certain private disputes, then it is free to choose carefully the areas in which it will render judgments.[45] In order to enhance its own effectiveness as a social institution, the Court may want to avoid certain areas altogether—especially areas in which the public, or the other branches of government, might resist its authority.[46]

Professor Bickel saw the political questions doctrine as the ultimate weapon in the Supreme Court's arsenal of discretionary devices for avoiding constitutional adjudication.[47] Rejecting the classical view, he argued that

> only by means of a play on words can the broad discretion that the courts have in fact exercised be turned into an act of constitutional interpretation governed by the general standards of the interpretive

41. *See* Wechsler, *supra* note 33, at 7-9. A commitment strongly *implied* by the text of the Constitution would meet this standard; Professor Wechsler suggests that the Guaranty Clause includes such an implicit commitment. *Id.* at 8. Cf. the text at notes 64-70, *infra*.

42. *See* 5 U.S. (1 Cranch) 137, 147 (1803).

43. *See, e.g.*, A. BICKEL, THE LEAST DANGEROUS BRANCH 1-33 (1962) [hereinafter cited as BICKEL].

44. *See, id., passim, esp.* 58. *See generally* G. GUNTHER, CONSTITUTIONAL LAW CASES AND MATERIALS 1532-35 (1975) [hereinafter cited as GUNTHER].

45. *See* BICKEL, *supra* note 43 *passim*; Scharpf, *supra* note 33, at 549-66.

46. *Cf.* Scharpf, *supra* note 33, 549-55.

47. BICKEL, *supra* note 43, at 183.

> process. The political-question doctrine simply resists being domesticated in this fashion. There is . . . about it . . . something greatly more flexible, something of prudence, not construction and not principle. And it is something that cannot exist within the four corners of *Marbury v. Madison.*[48]

In *Baker v. Carr*,[49] Justice Brennan made an attempt to "domesticate" the political questions doctrine by calling it

> essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an . . . initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[50]

Although Justice Brennan began by tying the doctrine to the constitutional limits on the Court's powers, the criteria he specified seem more consistent with the view that there are "prudential" political questions. Only the criterion of "textually demonstrable constitutional commitment" is truly consistent with the classical view of the political question.[51] In a case where there is a *total* absence of judicially discoverable and manageable standards, or where it is *literally* impossible to decide a case without impermissible policy judgments, the political questions doctrine would seem superfluous, since it is difficult to imagine how a plaintiff in such a case could prove an actual violation of a specific constitutional right. In the other instances listed by Justice Brennan, the classical view of judicial review would call for a decision by the Court.

It is probable, however, that Justice Brennan was attempting merely to summarize the *history* of the political questions doctrine. As will be shown,[52] the holding in *Baker v. Carr* itself, as well as the modern

48. *Id.* at 125-26.
49. 369 U.S. 186 (1962).
50. *Id.* at 217.
51. See the text & note 41, *supra*.
52. See the text at notes 139-66, *infra*.

Court's treatment of other matters involving the political process, suggest that the doctrine is much narrower than Justice Brennan's thesis statement implies.

The Justiciability of the Amending Process

There is nothing in Article V to suggest that whether a constitutional amendment has been ratified is a political question.[53] Congress is given the power (but not the sole power) to *propose* amendments for ratification by the states[54] and to choose whether ratification will be by state legislatures or by state conventions.[55] These are not adjudicative functions,[56] and there is no language comparable to that granting the Senate power to "try" impeachments and render "judgment" therein[57] or to the provision that "[e]ach house shall be the Judge" of its members' qualifications.[58] It is reasonable to suppose that the "necessary and proper" clause[59] of the Constitution grants Congress the power to provide for promulgation of amendments and other "housekeeping" matters;[60] but it should be equally clear that no such "housekeeping" measure can be used as a pretext for substantive restrictions on the power granted to the states by Article V.[61]

In *Hollingsworth v. Virginia*,[62] decided in 1798, the Supreme Court indicated that questions about the amending process are justiciable rather than political. The plaintiff contended that the eleventh amendment had not been properly adopted, since the President had not been given the opportunity to sign or veto the Congressional resolution proposing the amendment. Defendant argued that the Constitution gives the President no role in the amending process. Apparently, neither the Court nor the parties entertained the idea that this question of law ought to be decided by

53. *See* ORFIELD, *supra* note 4, at 13.
54. U.S. CONST. art. V.
55. *Id.*
56. *Cf.* Scharpf, *supra* note 33, at 539-40.
57. U.S. CONST. art. I, § 3, cl. 6.
58. *Id.* art. 1, § 5.
59. *Id.* art. I, § 8, cl. 18.
60. *See* Comment, *Proposed Legislation on the Convention Method of Amending the Constitution*, 85 HARV. L. REV. 1612, 1617-18 (1972). Current legislation gives the duty of promulgating amendments which have been ratified to someone called the Administrator of General Services. *See* 1 U.S.C. §§ 106b, 112 (1970). Prior to 1951, the Secretary of State was responsible for promulgating amendments. 3 Stat. 439 (1818); 65 Stat. 710-11 (1951).
61. *See* ORFIELD, *supra* note 4, at 63-65; *cf. Proposed Legislation*, *supra* note 60, at 1618.
62. 3 U.S. (3 Dall.) 378 (1798).

another branch of government; the Court held that the amendment had become part of the Constitution.[63]

Luther v. Borden,[64] a major political questions case decided by the Court in 1849, contains a remark[65] which commentators have regarded as a dictum to the effect that the Court will let Congress decide whether states have ratified amendments to the Federal Constitution.[66] The case has nothing to do with such amendments, however; and the statement makes perfect sense when construed as part of the case's *holding* that Congress would be allowed to decide which of two rival state governments was the legitimate one, and therefore which *state* constitution was in effect.[67] *Luther v. Borden* rested in part upon a construction of the Guaranty Clause,[68] and in part upon the idea that the right of Congress to seat its own members implicitly included a right to "recognize" state governments.[69] It cannot easily be construed as acknowledging a Congressional veto power over the procedures of state governments whose legitimacy is unquestioned.[70]

Yet there was an instance in which Congress exercised just such a veto power without being directly rebuked by the courts. On July 20, 1868, Secretary of State William Seward announced that he had received documents from legislatures in at least three-fourths of the states purporting to certify ratification of the fourteenth amendment.[71] He noted, however, that he had also received official notice that Ohio and New Jersey

63. *Id.* at 381. It cannot logically be maintained that the issue of justiciability was not before the Court, merely because no party *argued* that the validity of the amendment was non-justiciable. If the question were not justiciable, by definition the Court would be bound not to decide it.

64. 48 U.S. (7 How.) 1 (1849).

65. "In forming the constitutions of the different States, after the Declaration of Independence, and in the various changes and alterations which have since been made, the Political Department has always determined whether the proposed constitution or amendment was ratified or not by the people of the State, and the judicial power has followed its decision." *Id.* at 39.

66. *See, e.g.*, ORFIELD, *supra* note 4, at 8; Clark, *The Supreme Court and the Amending Process*, 39 VA. L. REV. 621, 630 (1953); Dodd, *Amending the Federal Constitution*, 30 YALE L.J. 321, 327 (1921).

67. The statement cannot be regarded even as a dictum on Federal amendments, since it did not even *purport* to say anything about such amendments. *See* Dyer v. Blair, 390 F. Supp. 1291, 1299-1300 n.20 (N.D. Ill. 1975) (Stevens, Cir. J.).

68. 48 U.S. (7 How.) at 42-46.

69. *Id.* at 42..

70. *See* Dyer v. Blair, 390 F. Supp. 1291, 1299-1300 n.20 (N.D. Ill. 1975) (Stevens, Cir. J.).

71. 15 Stat. 706 (1868).

had withdrawn their consent to the amendment. Expressing his "doubt and uncertainty" as to the legality of these resolutions, he certified that if the Ohio and New Jersey ratifications were still in force, the amendment was valid as part of the Constitution.

On the following day, both houses of Congress passed a resolution declaring that three-fourths of the states, including Ohio and New Jersey, had ratified and that the amendment was part of the constitution.[72] The record of the proceedings suggests bluntly that the Republican majority neither knew nor cared whether the Constitution gave states the right to rescind. The Senate passed the resolution without debate and without a roll-call vote.[73] In the House, the entire debate appears to have lasted only a minute or two.[74] A Massachusetts Republican moved to send the resolution, not to the Judiciary Committee, but to the Committee on Reconstruction. A Democrat protested that "it is an important question, and should go to the committee on the Judiciary." The Republican floor leader then indicated that his intention was to "pass it now," without any committee consideration at all. After some discussion of the idea of adding Georgia to the list (on the strength of a telegram in the possession of the Speaker which a Democrat suggested was a fabrication),[75] the resolution was passed by a near-perfect party line vote.[76] The Congressmen who voted that Ohio and New Jersey could not rescind were, virtually man for man, those who five months earlier had voted to impeach President Andrew Johnson for his refusal to obey unconstitutional orders.[77]

72. CONG. GLOBE, 40th Cong., 2d Sess. 4266, 4295-96 (1868).

73. The Senate had previously debated the legality of the Ohio rescission, but its validity was opposed primarily on the theory that—the Southern states being ineligible to participate—three-fourths of the states had already ratified, making the amendment already a part of the Constitution prior to the Ohio rescission. *Id.* at 876-78.

74. *Id.* at 4295-96.

75. *Id.* at 4296. Georgia actually ratified that day. H. DOC. NO. 124, 90th Cong., 1st Sess. 15 (1967). However, the Speaker's ambivalent attitude toward the telegram suggests it may have been previously prepared, in anticipation of a favorable Georgia vote.

76. The vote was 127 in favor, 33 opposed. Only one Republican voted with the Democratic minority against the resolution. CONG. GLOBE, 40th Cong., 2d Sess. 4296 (1868); S. DOC. NO. 8, 92d Cong., 1st Sess., BIOGRAPHICAL DIRECTORY OF THE AMERICAN CONGRESS, 1774-1971 *passim* (1971).

77. *Compare* CONG. GLOBE, 40th Cong., 2d Sess. 1402 (1868) *with id.* at 4296. Except for absentees—and for the one Republican mentioned in note 76, *supra*—the two votes were identical. For a discussion of the constitutionality of Johnson's impeachment, see R. BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 252-96 (1973).

It should be emphasized that this Congressional action was never tested in court. By the time the Supreme Court was called upon to construe the fourteenth amendment, in the 1873 *Slaughterhouse Cases*,[78] four additional states had ratified the amendment[79] so that ratification *vel non* by Ohio and New Jersey was a moot point.[80]

Apparently, the resolution of the Reconstruction Congress was not regarded as an important precedent even by contemporaries.[81] The discussion over including Georgia—whose ratification would have brought the total to three-fourths even without Ohio and New Jersey[82]— suggests that the Republican leadership was not entirely confident the gambit would succeed. Moreover, two years later New York rescinded its ratification of the fifteenth amendment,[83] and the Secretary of State did not certify the amendment as valid until enough states had ratified so that New York's

78. 83 U.S. (16 Wall.) 36 (1873).

79. H. DOC. NO. 124, 90th Cong., 1st Sess. 15 (1967).

80. Another question about the validity of the adoption of the fourteenth amendment—the fact that the Reconstruction Act compelled the Southern states to ratify as a condition of readmission to the Union—was not mooted by the subsequent ratifications, since it involved more than four states. *See* Suthon, *The Dubious Origin of the Fourteenth Amendment*, 28 TUL. L. REV. 22 (1953). However in *White v. Hart*, 80 U.S. (13 Wall.) 646, 649 (1872), the Court indicated in dictum that such a ratification was "a voluntary and valid offering," apparently alluding to the fact that ratification was a *quid pro quo* which Georgia was technically free not to deliver. In context, it is clear that the Court addressed the merits of the question, and did not, as has been suggested (*see, e.g.*, ORFIELD, *supra* note 4, at 16), mean to say that ratification is a political question. Other arguments for the validity of the Civil War Amendments are that they have been adopted by usage or acquiescence; that they were adopted by implication when the twenty-first amendment was adopted, since it specified the eighteenth by its number, implicitly acknowledging prior amendments as valid; or that the Southern states really did legally secede from the Union, and were thereafter only conquered territories, so that only three-fourths of the "loyal states" were needed to ratify. *See generally* United States v. Gugel, 119 F. Supp. 897 (E.D. Ky. 1954); CONG. GLOBE, 40th Cong., 2d Sess. 876-78 (1868); ORFIELD, *supra* note 4, at 73-74, 78-81. In short, abandonment of the idea that the Court will not review the procedure by which new amendments are adopted would not make it necessary to jettison the fourteenth amendment.

81. *See* Corwin & Ramsey, *The Constitutional Law of Constitutional Amendment*, 26 NOTRE DAME LAW. 183, 204-06 (1951).

82. Twenty-eight states were required, assuming all thirty-seven (including the old Confederacy as well as West Virginia, created without the consent of Virginia's Confederate government) were eligible to participate. *Without* Georgia *or* either of the two rescinding states, the total number of ratifications was only twenty-seven. *See* 15 Stat. 706, 707 (1868).

83. CONG. GLOBE, 41st Cong., 2d Sess. 377 (1870).

action was moot.[84] Shortly thereafter, the Senate twice rejected attempts to declare that no state might rescind its ratification of any future amendment.[85]

The next amendment whose validity was questioned before the Court was the eighteenth. In *The National Prohibition Cases*,[86] the Solicitor General, and Charles Evans Hughes as *amicus* for several states, argued that the challenges were non-justiciable.[87] The principal authorities for this contention appear to have been the Congressional resolution of 1868,[88] and Judge Jameson's statement that, while the Court has the *power* to decide the validity of an amendment, "perhaps" the Court "ought" to accept the judgment of Congress in order to avoid a "spectacle."[89] The state courts, however, which had handled a large volume of litigation involving the validity of state constitutions and amendments, had been virtually unanimous in holding amending procedures subject to judicial review.[90] Implicitly rejecting the suggestion that it had no power to adjudicate the issues, the Court decided all questions in the eight cases before it—including questions about the procedures Article V requires of Congress as well as of state legislatures.

The Coleman Decision: Hard Cases Make Bad Law

In several subsequent cases involving the validity of the eighteenth and nineteenth amendments, the Court decided further legal questions involving the amending process.[91] By the 1930's, a review of a line of

84. *Id.* at 1477. The proclamation listed New York among states which "had ratified," and added that the New York legislature had passed resolutions "claiming to withdraw" its ratification. *Id.* at 2290.

85. *See id.* at 3971; *id.*, 3d Sess. at 1381 (1871).

86. 253 U.S. 350 (1920).

87. *See* Dodd, *supra* note 66, at 323.

88. *See id.* at 323, 346.

89. JAMESON, *supra* note 9, at 627. *See* Dodd, *supra* note 66, at 323.

90. *See, e.g.*, Carpenter v. Cornish, 83 N.J.L. 696, 85 A. 240 (1912); Collier v. Frierson, 24 Ala. 100 (1854). *See generally* ORFIELD, *supra* note 4, at 14-15; Dodd, *supra* note 66, at 323, 327.

91. In *Hawke v. Smith*, 253 U.S. 221 (1920), a companion to the *National Prohibition Cases* (see the text at notes 86-90, *supra*), the Court held that ratification is a power bestowed by the Constitution directly on state legislatures or state conventions, and not on the states themselves, so that the states may not restrict their legislatures as to ratification. In *Dillon v. Gloss*, 256 U.S. 368 (1921), the Court held that Article V requires amendments to be ratified within a "reasonable time"; that Congress may prescribe a time when proposing an amendment, provided the time is actually reasonable; that seven years was reasonable; and that an amendment is part of the Constitution as of the time the necessary states have ratified, not as of the time of proclamation by the Secretary of State.

Court decisions spanning three centuries should have compelled the conclusion that the Court's duty "to say what the law is"[92] included the duty to pass on the constitutionality of amending procedures.[93] Yet in 1939, the Court in *Coleman v. Miller*[94]—without purporting to reverse prior jurisprudence[95]—injected the political questions doctrine into the ratification process. The case does not easily yield its precise holdings, and the reasons and authorities which might have persuaded a majority of the Court on any point are even more difficult to discern. Only two Justices joined Chief Justice Hughes in the statement styled "the opinion of the Court";[96] the divisions in the Court were "sufficient to confound prophets of all schools. . . ."[97]

In *Leser v. Garnett*, 258 U.S. 130 (1922), the Court held the nineteenth amendment to be validly adopted, over an argument that Article V imposes *substantive* limitations as to what type of amendments may be made to the Constitution. Plaintiffs also alleged that two state legislatures had violated their own rules, and thus had not validly adopted the amendment; but the Court held that notice by the proper legislative officials to the Secretary of State was binding on him, and "being certified" by him, on the courts. *Id.* at 137. This holding was later misconstrued as an endorsement of the political questions doctrine (see the text at notes 115-17, *infra*); but since it purported only to indicate what sort of evidence courts would accept to prove legislative actions, and since it assumed the Secretary of State to be performing a ministerial function, consistent with the true wishes of the legislature, it certainly cannot be read as acknowledging in the Secretary (much less in Congress) any discretion to derogate from state legislative intentions, or to decide questions of constitutional law. That *Leser* signalled no departure from the doctrine of the justiciability of the amending process is confirmed by the Court's holding in *United States v. Sprague*, 282 U.S. 716 (1931), that the power of Congress to choose between ratification by legislatures or conventions is based on "the plain language of article 5." *Id.* at 729. Far from finding limitations on judicial power to review that article, the Court announced canons of construction to be applied to Article V in the same manner as to other constitutional provisions. *Id.* at 731-32.

92. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177-78 (1803).

93. It is significant that a book written in 1936, then apparently the only attempt to catalogue all political questions, (*see* Scharpf, *supra* note 33, at 517 n.*) did not mention the amending process, not even as a *potential* source of such questions. C. POST, THE SUPREME COURT AND POLITICAL QUESTIONS (1936).

94. 307 U.S. 433 (1939).

95. The opinion of the Court referred, with apparent approval, to *Dillon* and *Leser*. *Id.* at 451-53. Justice Black criticized the Court for its inconsistency in not overruling *Dillon*. *Id.* at 458.

96. *Id.* at 435. Justices Black, Roberts, Frankfurter and Douglas dissented on the threshold question of standing, which consumed the bulk of the Court's opinion. *Id.* at 437-46, 456-57, 460-70. Justices Butler and McReynolds joined the opinion of the Court as to standing, but dissented on the merits. *Id.* at 470-74. Only Justices Stone and Reed joined Chief Justice Hughes on all issues.

97. Note, 48 YALE L.J. 1455 (1939). See note 96, *supra*.

Coleman involved a constitutional amendment proposed by Congress in 1924 to overrule a controversial Supreme Court decision on child labor.[98] At first, few states had ratified the amendment, and many had rejected it.[99] After nine years, however, there was a surge of interest in the child labor amendment: between 1933 and 1937 twenty-two states ratified, bringing the total to twenty-eight, only eight short of the required number.[100] Kansas legislators who had opposed ratification sued in state court to enjoin state officials from certifying that Kansas had ratified. They claimed the Kansas resolution was invalid on three grounds: (1) a "reasonable time" had elapsed between the proposal by Congress in 1924 and the ratification by Kansas in 1937; (2) Kansas had passed a resolution rejecting the amendment, and they argued that this barred the state from subsequently ratifying; (3) the Lieutenant Governor had cast a tie-breaking vote in favor of the resolution, an act which the plaintiffs suggested was unconstitutional. The Court affirmed a judgment of the Kansas Supreme Court rejecting these attacks on the resolution.[101]

Chief Justice Hughes' opinion held the question whether a reasonable time had elapsed to be a political question, not on the basis of a textually demonstrable commitment of the adjudication of this issue to Congress, but because such a determination would involve "an appraisal of a great variety of relevant conditions, political, social and economic . . . ."[102] The opinion points out that Congress could have prescribed a "reasonable time" when it proposed the amendment, and implies that an evaluation of the salient conditions is essentially the same kind of judgment whether it is made in advance or after attempted ratification by three-fourths of the states.[103]

Declaring that the effect of a previous rejection on a subsequent ratification should also be decided by Congress, the Hughes opinion relied on the precedent set by the Reconstruction Congress in 1868, adding cryptically that "[t]his decision by the political departments of the Government . . . has been accepted."[104]

98. 43 Stat. 670 (1924); *see* Coleman v. Miller, 307 U.S. 433, 435 & n.1 (1939). The amendment would have effectively overruled *Hammer v. Dagenhart*, 247 U.S. 251 (1918). *See* Scharpf, *supra* note 33, at 587.

99. *See* Coleman v. Miller, 307 U.S. 433, 473 n.* (1939) (Butler, J., dissenting).

100. *See id.* Thirty-six of the forty-eight states were required.

101. 307 U.S. at 433-37.

102. *Id.* at 453.

103. *Id.* at 453-54. But see the text at notes 107-09, *infra*.

104. *Id.* at 449-50. The court obliquely suggested a theoretical basis for its acceptance of the Reconstruction precedent when it added that "in accordance with

The Court was evenly divided on whether the legality of the Lieutenant Governor's participation was a justiciable or a political question.[105] The effect of this non-decision was to deprive the Hughes opinion of any consistency, since evidently all three Justices subscribing to it voted to decide on the merits as to the Lieutenant Governor's role.[106] These Justices, therefore, believed the Court powerless to decide whether a state's ratification is invalid on account of the lapse of a reasonable time (a mixed question of law and fact), or on account of a prior rejection (a question of law); but held the same Court competent to decide whether the same ratification is invalid because of the participation of the Lieutenant Governor (also a question of law).

Trying to unravel *Coleman v. Miller*, a contemporary observer suggested a rational basis for the Hughes opinion: on this particular set of facts, the effect of Kansas' prior rejection may have been "too closely linked with the time allowable for ratification" to allow resolution of the two issues in separate fora.[107] This view is especially plausible if the power to define a "reasonable time" is seen as a corollary of the power to propose amendments. A body having the power to propose may also have the power to limit the life of its proposals;[108] there is no reason to insist that the limitation be stated in years. An alternative formula, stating that a reasonable time would expire after seven years or at the occurrence of a certain event, whichever comes first, might be desirable—particularly if the event, such as rejection of the amendment, might indicate the expiration of a consensus.

Acknowledging that Congress has the power to include limitations in its own proposals does not necessarily imply a Congressional right to impose such limitations retroactively after a number of states have ratified. However, if the question before the Court involves divining past legislative intent—what limitations Congress intended when it proposed the

this historic precedent" the efficacy of ratification after rejection would be a political question, "with the ultimate authority in the Congress in the exercise of its control over the promulgation of the adoption of the amendment." *Id.* at 450. Yet to the exact extent that Congressional control over promulgation is more than an implied "housekeeping" power, it needs a principled defense, which the Court did not attempt. See the text at notes 59-61, *supra* and materials cited in note 61, *supra*.

105. 307 U.S. at 446-47.

106. The four Justices joining in the Black opinion regarded the question as political. *Id.* at 456-60. Apparently Justice McReynolds was absent for discussion of this issue. *See* Note, 28 GEO. L.J. 199, 200 n.7. Thus Chief Justice Hughes and Justices Stone, Reed and Butler must have found it justiciable.

107. ORFIELD, *supra* note 4, at 20.

108. *See* Dodd, *supra* note 66, at 341.

amendment, both as to time and as to the effect of a rejection—then deferring to the judgment of Congress on these *facts* is not the same as abrogating the power to decide questions of *law*.[109] Under this analysis, the three Justices' willingness to adjudicate the Lieutenant Governor issue is defensible, since this was a question of constitutional law unrelated to any power granted to Congress by Article V.

The question whether a state may rescind its ratification, unlike the question whether a rejection causes a reasonable time to elapse, cannot be rationally included within Congress' power to propose amendments. If Congress were to decide against rescission, it would not be limiting its own proposal; rather, it would be "bootstrapping" a constitutional consensus where none exists. If the Hughes opinion in *Coleman v. Miller* was based on the Congressional power to define a reasonable time, therefore, the citation of the Reconstruction precedent was unnecessary and inappropriate. If not, the apparent endorsement of that precedent must still be regarded as mere dictum on the question of rescission, which was not before the Court in *Coleman*.

Justice Black's concurring opinion[110] in *Coleman* is not so easily dispensed with.[111] Joined by Justices Roberts, Frankfurter and Douglas, he advanced an internally consistent theory:

> Undivided control of [the amending] process has been given by . . . Article [V] exclusively and completely to Congress. The process itself is "political" in its entirety, from submission until an amendment becomes part of the Constitution, and is not subject to judicial guidance, control or interference at any point.[112]

Resting his opinion on a "textually demonstrable constitutional commitment" rather than on any difficulties the Court might have in deciding, Justice Black might have cited the constitutional language on which he based his conclusion. Yet he cited no such language, for the simple reason that nothing in Article V suggests that its interpretation should be handled

109. This distinction is suggested by then-Judge Stevens' opinion in *Dyer v. Blair*, 390 F. Supp. 1291, 1301-03 & n.24 (N.D. Ill. 1975).

110. 307 U.S. at 456-60.

111. A technical basis for diminishing the weight accorded to the Black opinion, however, is that after these Justices stated their belief that plaintiffs had no standing (307 U.S. at 456), everything that followed was unnecessary to decision, and therefore mere dictum. In *Dyer v. Blair*, 390 F. Supp. 1291 (N.D. Ill. 1975), then-Judge Stevens also felt bound to disregard the Black opinion since "a majority of the Court refused to accept" it, and since it was inconsistent with prior Supreme Court holdings. *Id.* at 1299-1300.

112. 307 U.S. at 459.

differently from the interpretation of other parts of the Constitution.[113] Nor did Justice Black cite any historical materials showing that the framers meant to give Congress authority to bind the Court as to construction of Article V. Indeed, the available records suggest exactly the contrary.[114]

The Black opinion cited only one authority which related to constitutional amendments: a flagrant misquotation of *Leser v. Garnett*.[115] That case held "notice" from "the Legislatures of Tennessee and of West Virginia," certified to by the Secretary of State, "conclusive upon the courts."[116] Justice Black translated thus:

> Final *determination* by *Congress* that ratification by three-fourths of the States has taken place "is conclusive upon the courts."[117]

It should be stressed that Justice Black was not arguing that Congress has broad discretion to *act* under Article V; he affirmed that Congress "is governed by the Constitution."[118] Rather, he saw the courts as conclusively bound by an *adjudication* by Congress that its own action was constitutional.[119] To pose the extreme case, if Congress were to propose an amendment, then immediately declare that it had been ratified by the states—when in fact the world could see that not a single state had ratified—the courts would be powerless to declare the amendment invalid, and would be bound to decide future cases as though the amendment were part of the Constitution. The only answer to such a theory is that it is dead wrong. It might also be very dangerous.

Judging Amendments: A Functional Analysis

The concurring opinion in *Coleman* could not have been written by the Hugo Black we now remember, whose very critics remarked on his zeal for fidelity to the text of the Constitution and the intention of the framers. Rather, it was written by the former New Deal Senator who had come to the Court with a mission. Indeed, the votes of all nine Justices in *Coleman* might best be explained by reference to the contemporary controversy over the Court's role as a "counter-majoritarian" institution.[120]

113. *See* ORFIELD, *supra* note 4, at 13; *Proposed Legislation*, *supra* note 60, at 1637-38.

114. See the text at notes 133-37, *infra*.

115. 258 U.S. 130 (1922). *See* 307 U.S. at 457 & n.2.

116. 258 U.S. at 137.

117. 307 U.S. at 457 (emphasis added). But see note 91, *supra*.

118. *Id.*

119. *See id.* at 457-59.

120. Justices Butler and McReynolds, the remnant of the "four horsemen" who had stricken New Deal legislation on substantive due process grounds, felt the

The Child Labor Amendment was proposed in order to overrule a Supreme Court decision imposing substantive due process limitations on the right of Congress to make economic regulations—regulations which presumably had the support of a majority of Americans. It is easy to see how popular regard for the Court might be diminished by its declaring such an amendment invalid.

Judicial review of the amending process, if abused, would confirm the worst suspicions of those who accuse the Court of being a "super-legislature." Some modern observers have suggested that this danger—not so much the actual risk that the Court will improperly invalidate amendments which seek to curb its power, but rather the risk that the people will think the Court is deciding on this basis—would justify the relegation of all issues affecting the amending process to the status of "prudential" political questions.[121]

But the argument proves too much. It fails to consider the alternative. Perhaps the best cure for popular cynicism over the Court's role as a "super-legislature"—a body concerned with imposing the policies favored by its members rather than with construing the Constitution according to neutral principles—is simply judicial restraint. Even the loosest constructionists ought to be persuaded of the wisdom of a strict exegetical approach when the Court is deciding whether the Constitution has been amended. If there is one class of cases in which the Justices ought to strive to forget their personal sympathies, to use a "mechanical" formula involving text, intent and logic, this must be it. Respect for the Court and for the Constitution itself—not in the sense of agreement with every pronouncement, but in the more important sense of a willingness to be governed, born of confidence in the integrity of the institutions—demands that the rules be the same for all amendments; it is particularly important to apply the same rules to amendments which would limit the Court's role and to those which would expand it. Whatever the Court's proper role

issues were justiciable. Roosevelt appointees Black, Frankfurter and Douglas were joined by Roberts, regarded as a "swing man" on the New Deal, in advocating a sweeping doctrine of Congressional power over the constitutional amending process. Chief Justice Hughes and Justice Stone, regarded as "moderates," were joined by Reed, the most "conservative" Roosevelt appointee, in taking a "middle course." Political and economic analyses of Supreme Court voting are generally not helpful and often misleading (*see* Wechsler, *supra* note 33, at 13-14), but when so little reason and authority can be given for such a radical change in jurisprudence, resort to these sources is perhaps necessary.

121. This "hot potato" analysis of *Coleman* is advanced in Scharpf, *supra* note 33, at 587-89.

when it construes provisions universally accepted as part of the Constitution, it must be no more than a "referee" when deciding whether a provision is in the Constitution at all.

The case for judicial restraint in reviewing constitutional amendment procedures is based on the assumption that when a controversy arises in this area, the final decision must rest with someone who can be counted on to "adjudicate" rather than to "legislate." Constitutional amendments may be designed to overturn Court decisions, but they may also seek to limit (or to enhance) the powers of Congress, of the President, or of the states. Since it is impossible to find a final arbiter without an institutional conflict of interest, it is essential that the ultimate power of decision rest with the branch *most likely* to find and apply the law without injecting its own interests and passions. By disposition, by training, and by their relative insulation from the political process, the Justices of the Supreme Court are more capable of rendering such a neutral judgment than Congressmen, Presidents and state legislators.[122]

Congress has something of a bad track record at adjudication. The handling of the 1868 resolution concerning the rescissions of Ohio and New Jersey is a case in point.[123] The impeachment of Andrew Johnson, on what are now generally acknowledged to be unconstitutional grounds, is another.[124] A candidate who challenges the official results of a congressional election seems more likely to convince the House or Senate that his cause is just if he is a member of the majority party.[125] A conviction after impeachment, or a congressional judgment as to the qualifications of a

122. This point is at the heart of the "special function" argument for judicial review. See the text at notes 42-44, *supra*. It has been suggested that while the Court might be the most suitable forum for final review of ordinary legislation, this "functional" argument does not apply to constitutional amendments. Professor Orfield suggests exactly the contrary: "If orderly procedure is essential in the enactment of ordinary statutes, should it not be even more so as to the adoption of important and permanent constitutional amendments?" ORFIELD, *supra* note 4, at 21.

123. See the text at notes 71-80, *supra*.

124. See note 77, *supra*.

125. *See* 107 CONG. REC. 24 (1961) (Indiana officials certified Republican as winner of House seat; motion to seat the Republican pending congressional investigation of close election rejected, 166 Republicans in favor, 252 Democrats opposed. Party breakdown at 17 CONG. Q. ALMANAC 401, 506 (1961)); 121 CONG. REC. S1014-15 (daily ed. Jan. 28, 1975) (motion to seat Republican certified as winner of close New Hampshire Senate election, pending investigation, rejected 34-58, with only one Democrat in favor and only one Republican opposed. Party breakdown at 31 CONG. Q. ALMANAC 700, 2-S (1975)). *See also* D. MORGAN, CONGRESS AND THE CONSTITUTION 122-139, *esp.* 132 table 4 (1966).

Congressman, may not be subject to judicial review, even if based on unconstitutional grounds.[126] The record in these areas, however, suggests that it would hardly be wise for the Court to surrender "prudentially" to Congress the power to say whether an amendment has become part of the Constitution.

Even assuming every Congress would rise above partisan politics, and would also separate the issue of an amendment's desirability from the question of whether it had been properly passed, it would be virtually impossible to eliminate the problem of inconsistent adjudications. One Congress would not have the power to bind all future Congresses.[127] Dealing with the E.R.A., Congress might find that a state has no constitutional power to rescind its ratification. Five years later, a different Congress might read the Constitution and reach the opposite conclusion. Since this is a question of law and not of fact, it would seem that an adjudication by a subsequent Congress—even though made in the context of another amendment—would have the effect of raising new constitutional doubts as to the validity of amendments previously thought to have been ratified.

The other side of the coin is equally unappealing. Suppose, in the context of an amendment strongly favored by Congress, a question of law was decided in a way which made it possible to amend the Constitution rather easily. Subsequently, when considering a drastic and demagogic amendment which had clearly negotiated this lower hurdle, Congress would be unable to reverse itself without giving rise to justified skepticism about the integrity of the constitutional amending process. Of course, the Court would face the same dilemma if it made such a decision. However, it is submitted that the Court would be more likely, when considering the "nice" amendment, to keep in mind the possibility that "bad" amendments would be proposed in the future, and thus not arrive at a strained interpretation of Article V in the service of easing the path of the former.

It can be argued that inconsistent standards *ought* to be applied to different amendments—that a close question of law should be decided one way so that the Equal Rights Amendment will pass, and another way if it is necessary to defeat a proposal to repeal the Bill of Rights. Even if one were to accept this idea, with all it implies about how seriously one really takes the concept of a rule of laws and not of men, it would be bad to repose in Congress the discretion as to which amendments are subjected to "strict scrutiny." It has been suggested that the Court should refrain from

126. *But see* Powell v. McCormack, 395 U.S. 486 (1969), discussed in the text at notes 146-59, *infra*.

127. See note 29, *supra*.

adjudicating the question of ratification, since it might have a stake in the outcome.[128] But Congress has a bigger stake, not only insofar as Congressional power might be limited or expanded by a proposed amendment, but also in that Congress always plays a role in the proposal of the amendment.[129] Elihu Root stated the effect of giving Congress the dual roles of proponent and supreme judge:

> It would certainly be vain for a constitution to declare or imply limitations upon the power to amend it, if those limitations could be transgressed at will by the very persons who were intended by the people to be restrained and confined . . . .[130]

It must be noted that the sympathies of Congress will, with rare exceptions, be in favor of the amendments it has proposed by a two-thirds margin.[131] To concede to Congress the right to apply inconsistent standards to questions of law, with the underlying assumption that policy considerations will influence the application of these standards, is to give Congress the power to amend the Constitution *unilaterally* when it favors the amendment; and to block amendments through a third political step, after proposal and ratification, when it opposes them.[132]

The members of the Constitutional Convention feared that Congress might gain such power. Edmond Randolph's original proposed Constitution expressly provided that the Constitution should be amended "without requiring the assent of the National Legislature."[133] Every member whose reflections on the matter have been preserved seems to have assumed that since the Constitution was a limitation on the powers of Congress, and on the powers of a majority of the states to harm the interests of a minority, it was important to protect the amending process from manipulation by Congress or even by a simple majority of the states.[134] Only one member of the convention was outspoken in favor of a major role for Congress in the amending process, and his proposals were defeated.[135] Not until the

128. See the text & notes 121-22, *supra*.

129. Article V provides that amendments may be proposed either by a two-thirds vote of each house of Congress, or by a convention called by Congress at the request of two-thirds of the state legislatures. It has been suggested that Congress might have wide discretion in regulating such a convention. *See 1967 Hearings*, *supra* note 28, *passim*. But see materials cited in note 61, *supra*.

130. *See* Dodd, *supra* note 66, at 323.

131. However, Congress might oppose an amendment proposed by the convention method, or by a previous Congress.

132. See illustrations in the text at notes 167-69, *infra*.

133. 1 FARRAND, *supra* note 20, at 117; *see* 1 *id.* at 22.

134. *See* 1 *id.* at 202-03; 2 *id.* at 629-31; 3 *id.* at 367-68; 4 *id.* at 61.

135. *See* 2 *id.* at 467-68; 3 *id.* at 367-78.

last week of the Convention was it decided to give Congress any more than a ministerial role even in the *proposal* of amendments;[136] later, Hamilton defended the arrangement by pointing to the limited congressional role, and observing:

> We may safely rely on the disposition of the State legislatures to erect barriers against the encroachments of the national authority.[137]

It is submitted that the concerns which moved the framers to limit the role of Congress are still important. Even those who regard state or sectional interests as unworthy of protection must acknowledge that the Constitution protects other minority interests; and that these interests are equally threatened by granting a single majoritarian institution the effective power to amend the Constitution, as they would be by granting that same institution the final authority on all matters of constitutional interpretation.

A final reason must be advanced against the Court's abrogation of its authority: in each case, consider the worst that could possibly happen. Hamilton called the Supreme Court the "least dangerous" branch of government, not because it will always reach the right decision, but because it has "neither force nor will, but merely judgment."[138] The worst fears of the most unrelenting opponents of judicial power can never be realized, without at least the acquiescence of the other branches of government. Generally, such co-operation will be forthcoming, even when the other branches disagree with the construction of the Constitution put forth by the Court. However, a truly corrupt decision, an attempted judicial *coup d'etat*, might not be enforced; and the knowledge of this would presumably deter even a thoroughly corrupt judge. If it were to become firmly established, however, that Congress was the final judge of the validity of constitutional amendments, such a *coup*, in the form of a proposal of an amendment followed by a declaration that it had been ratified, would be irresistible except by armed rebellion.

Baker, Powell, and the Rejection of Unprincipled Avoidance

Subsequent Supreme Court cases leave considerable doubt about the vitality of the political questions doctrine, and particularly about whether there is anything left of *Coleman*. It was in *Baker v. Carr*,[139] the legislative reapportionment case, that Justice Brennan listed the traditional

136. *See* 2 *id.* at 557-59.
137. THE FEDERALIST No. 85 (A. Hamilton).
138. *Id.* No. 78 (A. Hamilton).
139. 369 U.S. 186 (1962).

bases of the political questions doctrine, including the "impossibility of deciding" because of a lack of manageable evidence or a need to make policy judgments;[140] but the holdings in that case and its progeny suggest that the "impossibility" category may be an empty set.[141] Certainly the evidence in *Coleman* was no more complicated, no more "social, political and economic,"[142] than that which the federal courts have routinely considered in reapportionment cases. *Baker* also held that issues involving *state* governments are not political questions,[143] implicitly overruling prior cases.[144] Since it is the state legislatures whose procedures are in question, this may mean the Court will not hesitate to rule on whether these procedures are constitutional.[145] Nor should a declaration by Congress make any difference; if Congress should declare Tennessee's legislature to be apportioned constitutionally, there is no reason to believe the Court would accept this determination as conclusive.

Powell v. McCormack[146] was perhaps the most important political questions case in this century. Reacting to allegations of crime and abuse of office by Adam Clayton Powell, Congress voted to exclude him at the beginning of the session. This was almost certainly unconstitutional, since the Constitution prescribes only age, citizenship and residence as qualifications for the office,[147] and provides that Congress may "expel" a member only by a two-thirds vote.[148] It seemed, however, that Congress would succeed in "expelling" Powell under the pretext of "excluding" him,[149] since the right of Congress to judge the qualifications of its own

140. *Id.* at 217. The passage referred to is reproduced in the text at note 50, *supra*.

141. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533 (1964); GUNTHER, *supra* note 44, at 1621 & n.3.

142. Coleman v. Miller, 307 U.S. 433, 453 (1939).

143. 369 U.S. at 210.

144. *See* Moyer v. Peabody, 212 U.S. 78 (1909); Scharpf, *supra* note 33, at 538 n.73.

145. When they ratify, the state legislatures are performing a "federal function." See the text at notes 6-8, *supra*. However, the basis on which state actions are distinguished from Federal actions in *Baker* is apparently that the former can be invalidated without a risk of "embarrassment" to co-ordinate branches of the federal government; this "prudential" distinction should put *all* state legislative actions within reach of the federal judiciary.

146. 395 U.S. 486 (1969).

147. U.S. CONST. art. I, § 2, cl. 2.

148. *Id.* art. I, § 5.

149. The motion to "exclude" Powell did carry by the two-thirds which would have been necessary to "expel" him; but the Court expressed doubt as to whether the required two-thirds vote would have been obtained if the motion had been to expel. 395 U.S. at 508-10.

members is the strongest case of a "textually demonstrable constitutional commitment" of an issue to resolution by a branch other than the Court.[150]

Chief Justice Warren, however, speaking for a nearly unanimous Court[151] (including, perhaps significantly, Justice Black), ruled that Powell had a right to his seat. The Court announced a view of the political questions doctrine even narrower than the classical view:[152]

> [A] determination of petitioner Powell's right to sit would require no more than an interpretation of the Constitution. Such a determination falls within the traditional role accorded courts to interpret the law . . . . Our system of government requires that federal courts on occasion interpret the constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the courts' avoiding their constitutional responsibility.[153]

The Court examined each of the criteria listed in *Baker v. Carr*, and found them inapplicable. Most significantly, *Powell* seems to say that even a broad constitutional grant of *adjudicative* power to Congress may not be exercised unconstitutionally; the only unreviewable power Congress might have would be to determine whether Powell in fact met the qualifications of age, citizenship and residence.[154]

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150. Impeachment is the only other example of an explicit textual commitment which had been thought unreviewable by the Court. *See* Wechsler, *supra* note 33, at 8.

151. Only Justice Stewart dissented, on grounds of mootness. Justice Douglas filed a separate concurring opinion. 395 U.S. at 551-74.

152. The Court's cursory citation of the various types of "prudential" considerations listed in *Baker* is deceptive in light of the concluding statement that whenever "an interpretation of the Constitution" is all a case calls for, these "prudential" considerations are automatically absent. *Id.* at 549. This statement, for which the Court relies on *Marbury*, would indicate an effective return to the classical view of the political question. But the Court's willingness to overlook an apparent "textual commitment" of the issue to resolution by Congress suggests an even narrower view.

153. *Id.* at 548-49.

154. The Court explicitly leaves this question open. *Id.* at 520-21 & n.41. Justice Douglas, concurring, states that a determination of fact by Congress as to a member's qualifications would be unreviewable. *Id.* at 552. Thus, by falsely "finding" Powell to be under 25 years of age, Congress might have insulated its decision from judicial review. This distinction—that congressional determinations of fact may be unreviewable, whereas questions of law will always be reviewed by the court—is applied to the amending process by then-Judge Stevens in *Dyer v. Blair*, 390 F. Supp. 1291, 1301-03 & n.24 (N.D. Ill. 1975). Under this analysis, a certification by state legislative officials, or perhaps by the federal official authorized to certify ratifications, that a state had voted to rescind, would be conclusive on the

Professor Gunther has expressed doubt whether, after *Powell*, "any constitutional questions remain which the Court is likely to find committed to other branches for final decision."[155] Certainly the "prudential" considerations were as strong in *Powell*, where Congress had already made its decision as to its internal affairs, as they would be in a constitutional amendment case, where Congress might or might not have expressed a view on the question. And the "textually demonstrable constitutional commitment" was much stronger in *Powell* than in any Article V case.[156] Since whether a state may rescind its ratification, like whether Congress could exclude Powell, is a pure question of law which "would require no more than an interpretation of the Constitution,"[157] the Court should not hesitate to decide the issue.

The contribution made by the Court in *Powell* to a sound resolution of the controversy over the amending process was not limited to its undermining of the theoretical foundations of *Coleman*. The *Powell* Court also confronted a number of past instances of Congressional "exclusion" of constitutionally qualified members-elect, and found the value of such precedents "quite limited." The notion underlying *Coleman*—that if the Court finds a precedent in past Congressional action, it need not undertake its own evaluation of the constitutionality of such action[158]—was summarily rejected:

> That an unconstitutional action has been taken before surely does not render that same action any less unconstitutional at a later date. . . . The relevancy of [such] cases is limited largely to the insights they afford in correctly ascertaining the draftsmen's intent. Obviously, therefore, the precedential value of these cases tends to increase in proportion to their proximity to the Convention in 1787.[159]

Given the time, circumstances and manner of its adoption, it would be difficult to underestimate the value of the Reconstruction resolution on rescission of proposed amendments as an aid in determining the intent of the framers of Article V. Accordingly, after *Powell* all authority for the proposition that rescission is a political question—*i.e.*, the Reconstruction resolution and the dictum in *Coleman* relying on that resolution—should be regarded as obsolete.

Court; but the legal effect of such a vote would be decided by the Court itself. *See id.* at 1301 n.24.

155. GUNTHER, *supra* note 44, at 482.
156. See the text at notes 53-58, *supra*.
157. 395 U.S. at 548.
158. See the text at note 104, *supra*.
159. 395 U.S. at 546-47.

Justice Stevens and the E.R.A.

The *Coleman* doctrine of partial non-justiciability of constitutional amendment questions was never accepted very enthusiastically by the lower federal courts, which tended to use guarded language about justiciability and then rule on the merits as to adoption of constitutional amendments.[160] The recent opinion in *Dyer v. Blair*[161] deserves noting because it involves ratification of the Equal Rights Amendment and because it was written by Justice Stevens shortly before his accession to the Supreme Court.

A majority of the members of the Illinois House and Senate had voted to ratify the E.R.A. A legislative rule, however, required a three-fifths majority vote, so the ratifying resolution failed. Plaintiffs, members of the legislature, argued that this rule was unconstitutional and requested that the court enjoin state officials to certify ratification.

Then-Judge Stevens rejected defendants' contention "that Congress has sole and complete control over the entire amending process, subject to no judicial review."[162] He pointed out that Justice Black's *Coleman* opinion was not the opinion of the Court, and that the Supreme Court had previously rejected the "political question" contention. Applying *Baker* and *Powell*, the court found that a mere interpretation of the Constitution was required, and that the risk of conflict with the views of Congress could not justify a failure to decide. The court distinguished the Hughes opinion in *Coleman* on the ground that there was no explicit congressional precedent concerning "super-majority" requirements and on the ground that, unlike the "reasonable time" involved in *Coleman*, the meaning of the term "ratification" must be the same for every amendment proposed by Congress, and therefore is a non-political question.[163]

The *Dyer* opinion contains a thorough exposition of the history and purpose of Article V, as well as the Supreme Court opinions prior to *Coleman*, which indicates that Justice Stevens regards the amending process as justiciable, virtually in its entirety.[164] Had *Dyer* been a Su-

160. *See, e.g.*, Trombetta v. Florida, 353 F. Supp. 575 (M.D. Fla. 1973); Petuskey v. Rampton, 307 F. Supp. 235 (D. Utah 1969), *rev'd on other grounds*, 431 F.2d 378 (10th Cir. 1970), *cert. denied*, 401 U.S. 913 (1971); United States v. Gugel, 119 F. Supp. 897 (E.D. Ky. 1954).

161. 390 F. Supp. 1291 (N.D. Ill. 1975).

162. *Id.* at 1299.

163. *Id.* at 1302-03.

164. *Id.* at 1302-07. Then-Judge Stevens clearly regarded the history and text of Article V as susceptible of judicial interpretation; the point of law he decided is

preme Court decision rather than the opinion of a three-judge panel, it is unlikely that such care would have been taken to distinguish *Coleman*.[165] The reasoning of *Coleman* is clearly inconsistent with that of *Powell*,[166] and then-Judge Stevens applied the latter to the constitutional amending process in *Dyer*.

Conclusion

The constitutional requirement of a consensus of three-fourths of the states for ratification can only be met by recognizing that a state can rescind its ratification of a proposed amendment. This is a question of constitutional law which must be decided in a court, not by Congress. The view that the question is justiciable and that states may rescind is consistent with the text and the history of Article V, with all Supreme Court cases prior to *Coleman v. Miller*, with the nearly unanimous view in the state courts, and with the reasoning of federal court decisions since *Coleman*. The limitations placed on the political questions doctrine by *Baker v. Carr* and *Powell v. McCormack* clearly render the question of rescission justiciable.

The contrary view—that whether states may rescind is a political question—is supported only by the resolution of the Reconstruction Congress, and by dictum in the discredited *Coleman* decision.

For those whose enthusiasm for the particular amendment now being considered might incline them to a "prudential" view that rescission should be a political question, it might be instructive to consider a few possible consequences of this view:

1) Immediately after proposal of an amendment by Congress, all but one of the needed states ratify. The amendment then stalls due to sectional opposition. Two years later, an unexpected consequence of the yet-unratified amendment comes to light, perhaps because of court decisions

perhaps *less* explicit on the face of Article V than the question of whether rescission is permissible.

165. Then-Judge Stevens felt bound by strict rules of *stare decisis*. *See id.* at 1299-1300. It is significant that his opinion advances a logical defense of the *Coleman* holding that Congress may determine a "reasonable time," but simply notes, and distinguishes, *Coleman* on the question of prior rejections and ratifications. *Id.* at 1301-02 & n.25.

166. The *Coleman* holding as to "reasonable time" may be consistent with *Powell*. See the text at notes 107-10 & 165, *supra*. But since the effect of prior ratification would seem to call simply for an interpretation of the Constitution, it seems impossible to reconcile the *Coleman* dictum on this question with *Powell*. *Cf.* Dyer v. Blair, 390 F. Supp. 1291, 1301 (N.D. Ill. 1975).

in related areas. Constitutional scholars are agreed that the amendment would have this undesirable effect. All 37 previously ratifying states rescind, but Congress (perhaps feeling compelled by its prior decision regarding the E.R.A.) declares the rescissions invalid. Any one state is now free to make the amendment part of the Constitution, even if no other state now favors the amendment.

2) Sufficient states have apparently ratified an amendment, but procedural attacks have been made on the ratifications of several states. Congress considers the question, the House concluding that the amendment is part of the Constitution, the Senate concluding it is not. The stalemate continues, and eventually the Supreme Court hears a case which must turn on whether the amendment is valid. It cannot be argued that the amendment is invalid unless "approved" by both houses, since ratification occurs as of the date the last state ratifies. Very simply, either the House or the Senate is *wrong*, and the Court, having ruled the matter a "political question," is powerless to act.[167]

3) The Louisiana Legislature, on the same day, ratifies both the Equal Rights Amendment and an anti-abortion amendment. One week later, the legislature votes to rescind both amendments. Congress rules that Louisiana may rescind the E.R.A., but not the anti-abortion amendment.

4) The ultimate scenario, wherein Congress proposes an amendment, then immediately declares that it has been ratified, has already been suggested. Variations make the idea more plausible: Suppose Congress perceived a "national emergency" and declared that any state not explicitly rejecting the amendment within two weeks would be deemed to have ratified?[168]

5) Note that a joint resolution of Congress only requires a simple majority in each House. Thus Congress could "judge" a *proposal* which received less than two-thirds of the votes cast, perhaps declaring the proposal effective on the basis that absent members might have voted in favor. If there is no judicial review, a simple majority in Congress could effectively propose and ratify an amendment.

167. Some authorities have also suggested that the President must have a role in any congressional action on an amendment, other than the act of proposing. Black, *supra* note 28, at 206-09; *1967 Hearings*, *supra* note 28, at 23-24 (statements of Senators Tydings and Proxmire). A presidential veto could thus prevent resolution of any political questions involved in determining the validity of an amendment.

168. Similar arguments, directed more to partisan politics than to constitutional exegesis, were advanced in the 1868 Senate debate over the effect of Ohio's rescission. CONG. GLOBE, 40th Cong., 2d Sess. 876-78 (1868).

Constitutional law scholars will recognize here the traditional "parade of horribles."[169] These are extreme examples; a longer list could be compiled of more plausible dangers partaking of the elements of the above. Yet, perhaps alone among decisions the Court can make, the declaration that an issue is a political question attaches to all cases involving the issue, not just those in which the doctrine is convenient.[170] So those who would drag Tennessee, Nebraska and Idaho, kicking and screaming, into an artificial constitutional consensus, leaving the construction of Article V forever in the hands of Congress, are leading the parade.

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169. Credit for promulgating this phrase has been given to Thomas Reed Powell. Arnold, *Professor Hart's Theology*, 73 HARV. L. REV. 1298, 1305 & n.26 (1960). It is a venerable technique, and a good one for evaluating the possible effects of actions which may be irreversible. Thus Professor Black calls our attention to the dimensions of the amending power: it can ". . . change the presidency to a committee of three, hobble the treaty power, make the federal judiciary elective, repeal the fourth amendment, make Catholics ineligible for office, and move the national capital to Topeka. These are (in part at least) cartoon illustrations. But the cartoon accurately renders the *de jure* picture, and seems exaggerated only because we now conceive that at least some of these actions have no appeal to anybody." Black, *The Proposed Amendment of Article V: A Threatened Disaster*, 72 YALE L.J. 957, 959 (1963).

170. It is suggested, for instance, that even the Court's deplorable decision on the merits in *Korematsu v. United States*, 323 U.S. 214 (1944), the Japanese exclusion case, was preferable to Justice Jackson's suggestion that the issue be declared a political question (*id.* at 242-48), since this would have been a declaration by the Court that it would never have authority to intervene in any case involving similar government repression of American citizens in time of war. *See* Scharpf, *supra* note 33, at 535-38, 562-66.